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No. 86-228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUOZAS KUNGYS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE BOSTON COLLEGE LAW SCHOOL HOLOCAUST/ HUMAN RIGHTS RESEARCH PROJECT, *AMICI CURIAE*, ON BEHALF OF RESPONDENT

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The Anti-Defamation League of B'nai B'rith, and the Boston College Law School Holocaust/Human Rights Research Project, pursuant to Rule 36.3, hereby move for leave to file the attached brief *amici curiae* supporting the respondent in *Kungys v. United States*, No. 86-228.

Consent to file the attached brief has been sought from the parties: while the government has consented, and the letter expressing such consent has been filed with the Clerk of the Court, petitioner, Juozas Kungys, has not. It is therefore necessary to request permission of this Court.

The background and concerns of the *amici* are hereby set forth in the Interest of *Amici Curiae* section of the attached brief. In sum, the Anti-Defamation League of B'nai B'rith, and the Boston College Law School Holocaust/Human Rights Research Project are national organizations which have long sought justice for victims of the Holocaust—as well as a fair and just application of our nation's immigration laws. Each organization is able to bring to the issues raised on this appeal the perspective of organizations dedicated to ensuring our immigration laws are sensitive to this nation's long-standing commitment to providing asylum for those fleeing persecution—while ensuring that we not become a refuge for persecutors.

Questions Presented

1. Where the government has proven by clear and convincing evidence that the truth, if revealed, would have triggered an investigation possibly discovering facts warranting denial of citizenship, may a naturalization order be set aside under this Court's holding in *Chaunt v. United States*, 364 U.S. 350 (1960).

2. Whether the conceded, willful mispresentations and concealments by petitioner about his date and place of birth, and his residence and occupation, during a time when massacres were committed where he was living, were "material" so as to warrant denaturalization under § 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).

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INTERESTS OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. To advance these goals, the ADL seeks good will and mutual understanding among Americans of all creeds and races and combats racial and religious prejudice and the deprivation of civil liberties.

From the beginnings of the unprecedented genocide committed by the Nazis against the Jewish people and other groups, the League has opposed Nazism in all its forms and activities. Following World War II, the League has sought to expose the perpetrators of those crimes against humanity and bring them to justice.

In support of these principles of protecting human rights for all, without regard for race, creed or religion, and its goal of seeking justice for the heinous human rights violations committed during the Holocaust, the ADL has filed numerous *amicus* briefs. *See, e.g., Fedorenko v. United States*, 449 U.S. 390 (1981) (concerning misrepresentation standard applicable to Nazi war criminal failing to disclose participation in commission of atrocities at Treblinka Concentration Camp); *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Ca. 1985) (civil action against former Croatian Minister of Police for war crimes).

The Boston College Law School Holocaust/Human Rights Research Project was founded in 1984 to develop and encourage legal scholarship on Holocaust-related law. The Project's work is intended to illustrate the precedential value of such law for current human rights law and to define legal responses to persecution in the post-World War II era. In its capacity as the only organization in North America devoted to the study of Holocaust-related law, amongst its other activities, the Project has provided Congressional testimony and supported litigation through research.

The Anti-Defamation League and the Holocaust/Human Rights Research Project's interest in this case rests on their particular concerns with the application of immigration policy as intended by Congress; to ensure that this country remains a haven for the persecuted and remains beyond the reach of those who engage in acts of persecution.

The League and the HHRRP respectfully offers this Court its accumulated experience with the issues raised by this case.

STATEMENT OF THE FACTS

A. The "Final Solution" in Lithuania

Prior to June 1941, Lithuania was under the control of the Soviet Union. On June 22, 1941, Nazi Germany invaded the Soviet Union and Lithuania. A333, 340, 1502-504[1]

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1. Page citations to the Joint Appendix in the Supreme Court are preceded by the letters "JTX;" page citations to the Court of Appeals Appendix volumes are preceded by the letter "A;" page citations to the Court of Appeals Trial Exhibit volumes are preceded by the letter "X."

Immediately after this invasion, groups of armed, local men were formed throughout Lithuania to take control of the communities where they lived. A363, 393. Entering German troops were welcomed as liberators by many Lithuanians and succeeded in obtaining active local assistance. A1504.

All persons identified as communists and all Jewish men, women and children throughout the occupied territories were to be killed as a matter of Nazi policy. The killing of all Jews was termed "the final solution to the Jewish question." A195-6, 1504-508. The task of killing Jews in Lithuania was assigned to a special German mobile unit called *SS Einsatzgruppe A*, subdivided into groups called *SS Einsatzkommandos*. A357. Moving close to the frontlines, the *Einsatzkommandos* entered the newly-occupied areas, obtained the help of local Lithuanians, and speedily performed the grisly tasks of identifying, confining and killing their victims. Most of the killings were carried out in the towns and hamlets where the civilians resided. A340-42, 358-64, 374-81; X218, 230, 259, 270, 277. By December 1941, approximately 137,000 Jews had been killed by the *SS Einsatzkommandos* and their local collaborators. A1508; X247. *See also The Nurenberg Trial*, 6 F.R.D. 69, 128, 142 (1946).

B. Petitioner and the Kedainiai Killings

1. Petitioner's Background

Petitioner Juozas Kungys was born September 21, 1915 at Reistru Village, Silales County in the Taurage region of Lithuania. A806; X117, 125, 163, 477-99, 536. In 1938, Kungys entered military service, received infantry training, and was graduated from cadet school. X121-27. In 1939, having attained the rank of junior lieutenant, he left military service and began work with the Bank of Lithuania in Kedainiai. X128-163. He remained in that employment throughout both the Soviet occupation and the first few months of the Nazi occupation. In mid-October 1941, he moved 25 miles south to Kaunas, Lithuania's capital. X155, 167, 501; A1527-528.

While in Kedainiai, Kungys joined the Sauliai (the riflemen association) which, inter-alia, provided military training. He also practiced his shooting skills at the rifle range. X90-1. Throughout the period of his bank employment in Kedainiai, Kungys resided as

a boarder at 3 Radvilu Street, a house owned by the parents of his future wife. *Id.*; X167, 500, 1067-068. During his tenure at the bank, he came to know Juozas Kriunas, who was then chief accountant of a local cooperative known as Dirva. A1003-004; X568-69, 992-93. Kungys also became acquainted with another resident of the house, Jonas Dailide, who continued boarding there until the mid-nineteen fifties. X921, 1063-068. Both Dailide and Kriunas testified by videotaped deposition.

2. The Kedainiai Killings

In 1941, the town of Kedainiai had a population of well over 8,500, including some 2,500 Jewish men, women and children. A1510. The district of Kedainiai, comprised of some 16 villages, had a population of about 102,000. *Id.*; A313-14; Janson dep. 30-1; *see also* X633. Both before and during World War II, Kedainiai had fewer than 10 policemen.

Shortly after the Nazi invasion, local men in the Kedainiai district who had military experience or who were members of the riflemen association, the Sauliai, were grouped in civilian auxiliary detachments to assist the regular police. These men kept their usual employment during the day, but at night, wearing white arm bands for identification, patrolled streets and guarded bridges. A797-801, 1511; X569-72, 679-81, 696, 843-44, 882-83, 922-27, 944, 1128-31.

Soon after the German occupation began, Kedainiai's Jewish residents were ordered to wear a Star of David, were forbidden to use sidewalks and were forbidden to speak with non-Jews. They were later confined behind barbed wire in a small ghetto. A797-801; X575-77, 695-97, 843-44, 940-42, 1079-082, 1117-118. The civilian auxiliaries helped patrol the ghetto perimeter at night. A1511; X926-27, 942-43.

In July 1941, about 125 men and women, believed to be communists or former Soviet government officials were arrested and imprisoned in a barracks in Kedainiai. Armed members of the civilian detachments transported these men and women in groups from the barracks to a nearby forest, Babeniai, in trucks. Some members of the civilian detachments guarded the area, while other civilians and

German soldiers directed the prisoners into a large pit. There, the men and women were shot by the Germans. A1511; X922-38, 997-98, 1007. *See also* X233, 247, 574-74, 686-90.

Members of the local civilian auxiliaries also helped kill Kedainiai's Jewish residents. After the Jewish population had been assembled in the ghetto, they were marched to a horse breeding farm named Zirginas on the outskirts of town, where they were confined. X697-98, 844. On August 28, 1941, the civilian detachments, as well as certain groups of local workers, were ordered to assemble in Kedainiai together with the regular police and German soldiers. X568, 591, 756-57, 763-71, 845-49, 867, 880, 945-47, 990-1000. *See also* X1122-126. Some of the civilians were taken by trucks to a place near Zirginas, where a huge pit had been dug. Lime, beer and vodka were also brought to this place. X594-602, 768-78, 777-79. Other armed civilians stood guard at a perimeter 50 to 60 meters from the ditch to prevent escape and to block persons from entering the killing ground. X594-95, 620-21. *See also* X853, 951-62. Then, a special detachment of German soldiers arrived. A1511.

The Jews were taken in groups from the Zirginas barns to the ditch, a distance of about one kilometer. Germans and Lithuanian civilians directed the line of march and helped load those unable to walk into trucks bound for the pit. Once there, the victims were ordered to undress, forced into the pit and shot. A1512; X592-94, 598-99, 622, 782-86, 789-93, 803-04, 952-55, 982-83, 988-99, 1009.

Engines were kept running to muffle the victims' screams. X584, 602, 784, 861-67. The shootings continued into the evening, until all the Jews were killed. X600, 622, 963, 974. Nazi records recite the killing of 710 Jewish men, 767 Jewish women and 599 Jewish children in Kedainiai on August 28, 1941. X252; A1511-513.

3. Evidence Presented of Kungys' Role in Persecution and Killings

About 100 men in Kedainiai participated in the civilian auxiliary groups, according to the testimony of witnesses in Lithuania and the United States. X569-72, 679-81, 697, 834-44, 882-83, 925-27,

X1128-131; A797-801. Many of the auxiliaries had been in the military, had received military training, or had been members of the riflemen association, the Sauliai. A1511. Kungys, a former army junior lieutenant with infantry training, admitted that he had been a member of the Sauliai, in Kedainiai, and practiced his rifle shooting there. X90-1; A843-45.

Two witnesses testified that Kungys acted as the leader of one detachment numbering 20 to 30 men. One of the witnesses was Kungys' former roommate, Dailide, the other witness was the former chief accountant of a local cooperative, Kriunas. X569-72, 580, 922-27. *See also* X793, 810-11, 862-63, 994-95, 1014-017.

Lists of the auxiliary detachment members were kept at the headquarters of the German commandant, which was next to the Kungys' residence. A998-99; X681, 924, 1082-083. Kungys kept a list of the members of his group at his desk in the commandant's office, across the street from Kungys' residence. X633, 645-46. *See also* X503.

When Kungys was interviewed by government attorneys in March 1981, he was read a list of 44 names taken from affidavits of persons who allegedly served with Kungys or other detachments during the Kedainiai killings; at that time he was not told the source of the names. Kungys swore he recognized only two of the 44 names. JTX 117-128.

Soon after the complaint was filed, Kungys wrote a letter to a prospective defense witness stating that:

> [T]hey [government counsel] presented before me the longest list of Riflemen's Association members from the commandant's office and kept asking me whom I knew.
>
> I don't know why our people are so unwilling to help one another. Just look at how the descendants of Abraham are doing it.

JTX 139.

He denied under oath any knowledge of the Kedainiai killings and any knowledge of the names read to him by the government. Kungys admitted to a prospective defense witness that he had recog-

nized many of the names as former riflemen association members, and that he knew that the "commandant's office" kept such a list. X633, 645.–At the trial, Kungys admitted the authenticity of the letter, A954-55, and he also admitted that the riflemen association members referred to in his letter were the people about whom he was questioned during the March 1981 interview. A1007-016.

Witnesses Kriunas and Dailide described Kungys' participation in the July executions at Babenai forest. Kungys was seen at the barracks where the civilian auxiliaries had assembled. Later, he was seen riding in the cab of a truck arriving at Babenai with the condemned prisoners. X932-37. One of Kungys' auxiliaries testified that Kungys later admitted participating in the killings. X574-75.

These witnesses also described Kungys' involvement in the persecution and killing of Kedainiai's Jewish residents. They stated that Kungys ordered his auxiliaries to help force the Jews into the ghetto and to confiscate their property. X583-85. He also supervised his men on guard at the ghetto. X577-79, 926-27, 942-43. Kungys and his men also helped guard the ghetto residents en route to the horse farm just prior to execution. X582-83.

On the day of the execution Kungys ordered his men, armed with rifles, to assemble. X588-90, 947-48. He ordered some of his men to take the Jews from the horse farm barns to the execution pit. X588. He ordered others to stand guard near the pit and to place old and disabled victims into trucks. X948-50, 963.

At both the barracks and the pit, Kungys gave commands, and interpreted and transmitted German orders to members of the Lithuanian civilian auxiliaries. X588-99, 947-51, 1001-002. *See also* A1057, X536. He led his unit in moving Jewish women and children from the barns to the ditch where he ordered victims to undress. X591-93. Women and their children were forced into the pit whereupon, Kungys, and others, shot them. *Id.; see also* X594, 618, 865-65, 784-87, 962-63. Kungys and his men also brought a group of Jewish men to the execution pit. Kungys ordered them to undress and then participated in shooting them. X597-98.

C. Kungys' Post-Kedainiai Activities

According to information Kungys provided to German officials, from 1941 onward he was the manager of an industrial concern in Kaunas. JTX 65; X495, 524, 543, 547. *See also* X977, 1069-071. In August 1944, as the Red Army advanced, Kungys and his wife fled and eventually settled in the Tuebingen region of Nazi Germany. *Id.* X524; A2021. Kungys applied for and received permission from Nazi authorities in Tuebingen to reside in Nazi Germany without special restrictions. JTX 59. His wife applied for permission from Nazi authorities to practice dentistry. X1279; A1276-80.

Kungys registered with local authorities in Tuebingen. Nearly all the Tuebingen registry records show his true date and place of birth. *See* JTX60, 67-68; X475-99. In applying for matriculation at Tuebingen University in 1945, Kungys submitted a 1938 seminary record showing his true date and place of birth. JTX 61; X536; A1530.

D. Kungys' Concealments to Obtain a Visa

Kungys applied for an immigration visa at Stuttgart, Germany in January 1947. To obtain his visa, he submitted certain applications together with supporting documents, such as birth and police records. The district court found, and Kungys conceded, that in his visa application he misrepresented and concealed his date and place of birth, his places of residence during the period 1940-1942, and his wartime occupation. The court also found that to support his application, Kungys submitted four documents (JTX 28, 29, 37, 38) each of which contained false information regarding his date and place of birth. One such document, bearing the seal "Nazi victims," alleged Kungys had been persecuted by the Gestapo. JTX29; A1530-531. Kungys had previously given Nazi authorities in another part of Germany true information, and he possessed or could have obtained supporting documents with the true information, *e.g.*, his Tuebingen registry and seminary records. Kungys gave false information and documents to American officials. *Id.*

An applicant who gave false documents or documents with false information would not have met the requirements for obtaining a visa. JTX 199-203. Seymour Maxwell Finger, a professor and

former United States Ambassador to the United Nations who had served as the vice-consul in Stuttgart at the pertinent time, testified, without contradiction, that a visa would routinely be denied to any applicant who lied to the vice-consul concerning any one of the facts petitioner misrepresented. *Id.*

Ambassador Finger also testified, without rebuttal, that any factual inconsistencies between information contained in visa application forms and supporting documents always called into question the authenticity of the supporting documents. Upon discovering a discrepancy, an investigation would have been undertaken, including a check of available records in each of the applicant's prior places of residence, especially those readily available in Germany. If the investigation results showed that the applicant had misstated the facts to the vice-consul, the visa application would be denied. JTX 198-200.

E. Kungys' Concealments to Obtain Citizenship

Kungys executed an Application to file a Petition for Naturalization, an attached Statement of Facts for Preparation of Petition (Form N-400), X28, and a Petition for Naturalization (Form N-405), X33 in October 1953. At his naturalization examination petitioner reviewed the Form N-400, X28, and swore to the truth of the contents; he also executed under oath a Petition for Naturalization. In each of these documents Kungys swore to a false date and place of birth. In addition, Kungys falsely swore in form N-400 that he had not previously given false testimony to obtain benefits under the immigration and naturalization laws. A1532; X1173-176, 1183-86.

Julius Goldberg, a retired immigration judge and the naturalization examiner who processed Kungys' application, testified, without rebuttal, that applicants who gave false testimony to obtain benefits under the immigration and naturalization laws were denied naturalization. X1173-176, 1183-86, 1200-203, 1223; A521-34. Judge Goldberg also testified that when an applicant gave information in his naturalization papers that was inconsistent with data contained in his visa papers, the naturalization application either would be denied outright or, at a minimum, suspended and referred to the Immigration and Naturalization Service for investigation. *Id.*; 1200-202, 1223.

F. Kungys' Post-Naturalization Concealments

Kungys lied under oath that he did not reside in Kedainiai during July and August 1941, when questioned by the government in 1975 and 1981, JTX 73, 85-86, and throughout the litigation below. Similarly, in 1975 and 1981 and throughout the litigation below, he denied all knowledge of the Kedainiai killings, in which about one-fourth of Kedainiai's residents perished. Kungys lied under oath to the government in 1975 as to his date and place of birth. In 1981, he lied initially under oath concerning his date and place of birth. It was only after realizing he had identified related holographic documents with truthful information did he change his testimony:

> Kungys explained he had lied about his date and place of birth only "to escape the Germans . . . strictly because of my activities against the Germans."

JTX 131-137.

The District Court's Opinion

The district court found that Kungys gave false testimony to United States immigration officials regarding his date and place of birth, his wartime residence and his wartime occupation. A1531, 1533. To support his visa application, Kungys submitted documents with false information relating to his personal background. *Id.* The court rejected Kungys' assertion that he was employed at a printing house in Kaunas during the time of the extermination of Jewish residents. The court found to the contrary, that petitioner had resided in Kedainiai throughout the period of the killings. A1528.[2]

The court further found that Kungys, falsely stated, under oath, his date and place of birth to a naturalization examiner at the time he petitioned for citizenship, and that Kungys lied in the naturalization application when he claimed that he had not previously given false testimony to obtain benefits under the immigration and naturalization laws. A1532-533. Nevertheless, the court held that peti-

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2. The court was unpersuaded by an employment document, X36, Kungys first gave I.N.S. investigators in 1977 to support this alibi. A885-89.

tioner's misrepresentations were not "material," and therefore, that denaturalization was unwarranted.[3] A1527, 1538.

The court found that the videotaped deposition testimony of witnesses in Lithuania provided a strong factual predicate for granting judgment for the government. The court stated that defendant's false testimony that he left Kedainiai before the killings, would tend to corroborate the evidence of his complicity in the killings. However, the court refused to admit into evidence against petitioner any inculpatory testimony by these witnesses respecting Kungys' actual role in the persecution and murder. The court admitted and fully credited these witnesses' detailed descriptions of the killings in Kedainiai for all other purposes. A1511, 1513, 1520, 1526.

The Court of Appeals' Opinion

The court of appeals reversed the district court. It held that the misrepresentations about date and place of birth in Kungys' visa application were material and provide a basis for revocation of citizenship. The court held that truthful statements by Kungys would have led to an investigation, which in all probability would have revealed the disqualifying fact that the defendant had not been a victim of Nazi persecution and therefore would not have been eligible for a visa.

The court elected not to reach the evidentiary issue of the admissibility of the videotaped testimony, finding the presence of sufficient material evidence in the trial record concerning Kungys' misrepresentations of date and place of birth to resolve the denaturalization issue.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Well imbedded in the fabric of United States immigration law is the premise that the acquisition of American citizenship is not a natural right held by an alien, but a privilege enjoyed by sufferance of the United States. *See United States v. Smith*, 62 F.2d 808, 810

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3. The court also found an insufficiency of evidence to support petitioner's claim that he had served in the underground during the war, which purportedly led him to conceal his true date and place of birth. A1528-529. *See also* A1409-411.

(7th Cir. 1933), *citing Johanessen v. United States*, 225 U.S. 227; 240 (1912). It is a conditional privilege granted only after strict compliance with congressionally defined prerequisites.

> As this Court has explained:
>
> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . .

Fedorenko v. United States, 449 U.S. 490, 507 (1981), *quoting United States v. Ginsberg*, 243 U.S. 472, 474-475 (1917).

One of the conditions of the acquisition of citizenship is that "our Government is afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States." *Corrado v. United States*, 227 F.2d 780, 784 (6th Cir. 1955); *see United States v. Accardo*, 113 F. Supp. 783, 787 (1953). "Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discovered. Failure to give frank, honest and unequivocal answers to the court when one seeks naturalization is a serious matter." *Chaunt v. United States*, 364 U.S. 350, 353 (1960). Such failure to be truthful is a serious matter because it deprives our government of its right to pursue those inquiries necessary to make a fully informed judgment about an applicant for citizenship.

Juozas Kungys lied to our government both at the visa application and at the naturalization proceeding. Kungys failed to give a "full and truthful response" to the relevant questions posed at each examination. As a result of his deception concerning such fundamental facts as his wartime residence and occupations, as well as key facts bearing on his identity including his birthdate and birthplace, the government's self-protective right to investigate aliens seeking citizenship was undermined. That the government's rightful opportunity to investigate Kungys at the time of his application for a visa was thwarted is especially troubling, considering Kungys' presence in Kedainai, Lithuania during the massacre of over 2,000 unarmed Jewish men, women and children in the summer of 1941.

Kungys told a lie at the very times the burden was on him to convince the government he was eligible to be a United States citizen. Thus in 1947 and 1954, through concealment and misrepresentation, Kungys evaded the heavy burden traditionally imposed on those seeking a visa and naturalization. *See Berenyi v. District Director, INS*, 385 U.S. 630 (1967). Once a citizen, the burden shifted to the government to prove its case for denaturalization by "clear, unequivocal and convincing evidence." *Schneiderman v. United States*, 320 U.S. 118, 125 (1943). In 1987, Kungys seeks to rely upon this governmental burden to shield him from loss of citizenship. It would be ironic if through deception, Kungys were able to foreclose government inquiry, shift the burden of proof, and immunize himself from further investigations. Such a result is indeed an incentive to lie. *See Maikovskis v. I.N.S.*, 773 F.2d 435, 442 (2d Cir. 1985).

ARGUMENT

I. THE PROPER STANDARD FOR THE MATERIALITY OF MISREPRESENTATIONS AND CONCEALMENTS UNDER THE SECOND PRONG OF *CHAUNT* AND 8 U.S.C. § 1451(a) IS THE "POSSIBLY" STANDARD

Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), provides that in a denaturalization proceeding, the government must prove that the order granting citizenship was "illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation." *Id.*

Kungys would rely on the finding of the district court below that his misrepresentations and concealments, though willful, were not "material" under *Chaunt v. United States*, and therefore no ground for denaturalization. This, *amici* submit, was plain error and properly reversed by the court of appeals, holding Kungys' misrepresentations to be material under *Chaunt*.

In *Chaunt v. United States*, 364 U.S. at 350, this Court examined certain concealments made by the defendent in connection with his petition for naturalization. The concealments included the fact that *Chaunt* had been arrested for speechmaking and handbill distributing activities and a breach of the peace. In deciding that *Chaunt's* failure to disclose his arrests was not material, the Court articulated

a two-part materiality test, either prong of which, if demonstrated by the requisite burden of proof could serve as the basis for revocation of citizenship:

> (1) that facts were suppressed which, if known, would have warranted the denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Id. at 355.

Significantly, the Court focused upon the "totality of the circumstances" in assessing materiality:

> The totality of the circumstances surrounding the offenses charged makes them of extremely slight consequence. Had they involved moral turpitude or acts directed at the Government, had they involved conduct which even peripherally touched types of activity which might disqualify one from citizenship, a different case would be presented. On this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of 'clear, unequivocal, and convincing' evidence that naturalization was illegally procured within the meaning of § 340(a) of the Immigration and Nationality Act.

Id. at 354.

In applying a "totality of the circumstances" analysis, the *Chaunt* Court examined the substantive nature of the crimes for which the defendant was arrested. The Court noted that the offenses charged involved no moral turpitude nor did they even peripherally touch types of activity which might disqualify one from citizenship. *Id.* Essentially the Court found Chaunt's concealment of his arrests immaterial because even when disclosed the acts charged "were not reflections on the character of the man seeking citizenship." *Id.* at 353.

A. The Conflicting Standards Under *Chaunt*

Since the announcement in *Chaunt* of the "two prong" test for materiality, three interpretations of the second prong have emerged. The first interpretation, advocated by Kungys in the case at bar, draws no difference between the two prongs of the *Chaunt* materi-

ality test. It is the so-called "certainty" test and it maintains that under either prong the government must prove the undisclosed information "would" have led to the discovery of facts warranting denial of a visa. *See Fedorenko v. United States*, 449 U.S. at 518-26 (1981) (Blackmun, J., concurring); *United States v. Sheshtawy*, 714 F.2d 1038, 1040-41 (10th Cir. 1983).

> The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity.

United States v. Montalbano, 236 F.2d 757, 759 (3d Cir. 1956). *Accord, United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); *Corrado v. United States*, 227 F.2d 780 (6th Cir. 1955).

This view of the *Chaunt* materiality test renders the second prong of *Chaunt* a meaningless reiteration of the first. This interpretation, advocated by petitioner, seeks to overrule this Court's opinion in *Chaunt* by collapsing the two-tiered materiality test into one. Additionally, it frustrates Congress' intent in creating two independent grounds for denaturalization, illegal procurement and misrepresentation, *see* 1961 amendment to the Immigration and Nationality Act of 1952.[4] Requiring that the government prove

4. Pub. L. 87-301 §18, 75 Stat. 650, 656, 87th Cong. 1st Sess. (1961). Prior to passage of this amendment, the only basis for denaturalization under 8 U.S.C. §1451(a) was proof of concealment of material facts and willful misrepresentation. Congress decided to restore illegal procurement to the denaturalization statute in order to have two separate grounds for denaturalization. The Report of the House of Representatives leading to the new legislation leaves no doubt as to Congress' intent:

> Naturalization is illegally procured if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted. In other words, naturalization has been illegally procured if jurisdictional factors are not present at the time the citizenship is granted. *United States v. Ginsberg*, 243 U.S. 472.
>
> Notwithstanding that the law is, and has been, that "A person may be naturalized as a citizen of the United States in the manner

the actual existence of disqualifying facts effectively transforms the misrepresentation offense, *see* 8 U.S.C. §1451(a), into a form of the illegal procurement offense. This reading of the *Chaunt* two-prong test strips the misrepresentation provision of any independent meaning. *See Fedorenko*, 449 U.S. at 745.

Moreover, the certainty test sought by Kungys cannot be justified by policy considerations. To the contrary, requiring the government to prove "ultimate facts" at the time it discovers the applicant's deception encourages "the alien to conceal material information in his visa application documents and reward[s] him for the initial success of his nondisclosure." *Maikovskis v. I.N.S.*, 773 F.2d at 442. In lying about his background, an applicant for citizenship thereby prevents the government from investigating his fitness precisely when he has the burden of proving eligibility. *See Berenyi v. District Director, INS*, 385 U.S. 630, 636-37 (1967). If his deception is later discovered, this approach requires the government to carry out three difficult tasks: conduct an investigation into the past, discover ultimate facts warranting disqualification and prove those facts in court by clear and convincing evidence. *United States v. Fedorenko*, 597 F.2d 946, 951 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981). *See Schneiderman v. United States*, 320 U.S. 118, 123 (1943). As the Fifth Circuit in *Fedorenko* concluded, "if that were the law, an applicant with something to hide

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> and under the conditions prescribed in this title *and not otherwise*" (sec. 301(d), Nationality Act of 1940, sec. 310(d) Immigration and Nationality Act . . .)[,] section 340 makes no provision for cancellation of citizenship where the conditions prescribed by Congress did not in fact exist—unless misrepresentation, etc. is involved.
>
> The congressional mandate that no person shall be naturalized unless possessed of certain qualifications is ineffectual unless there is also statutory provision for revoking citizenship where the prerequisites did not in fact exist. . . . [W]hile section 101(f) of the Immigration and Nationality Act spells out in detail the type of conduct which precludes an alien from establishing good moral character (thus barring him from eligibility for naturalization), the principle that willful misrepresentation and so forth must be established renders that section of the law inoperative, notwithstanding its clear and unmistakable purpose and intent.

H.R. Rep. No. 1086, 87th Cong., 1st Sess. 39 (1961).

would have everything to gain and nothing to lose by lying under oath to the INS." 597 F.2d at 951. In penalizing the government for this foreclosure of inquiry, the certainty test should be disregarded.

Another interpretation of the second prong of the *Chaunt* materiality standard is the "probability" test. This test holds that "the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa." *Maikovskis v. I.N.S.*, 773 F.2d at 442. It was applied by the Third Circuit in this case.

B. The "Possibly" Standard Is The Proper *Chaunt* Standard

The proper interpretation of the second prong of the *Chaunt* materiality test is the "possibly" or "might have" standard. This standard provides that the government must prove that an investigation prompted by a truthful answer "might have led to the discovery of facts justifying denial of citizenship." *Fedorenko*, 449 U.S. at 528 (White, J., dissenting). *See, e.g., United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984); *Fedorenko*, 597 F.2d 946.

The "possibly" standard is sensitive to the heavy burden placed upon the government in denaturalization cases in that it does not compel the government to conclusively prove the facts justifying denial of citizenship. It accounts for the difficulties that arise when many years have passed between the time the information was concealed by the applicant and the time the concealment is discovered. *See Fedorenko*, 449 U.S. at 527-528 (White, J., dissenting).

The problem is twofold. Under the alternate interpretations of *Chaunt*, if the government must prove facts justifying denial of citizenship it would have to prove the facts that existed many years prior to the time of the citizenship application. *See, e.g., Chaunt v. United States*, 364 U.S. at 355. Moreover, "the government's ability to investigate with vigor may be affected adversely by its inability to discover that certain facts have been suppressed." *Fedorenko*, 449 U.S. at 524.

In the case of Juozas Kungys, given the totality of the circumstances, the standard that ought govern his denaturalization determination envisions an investigation possibly leading to disqualifying facts. First, as in many cases concerning war-crimes, much time has passed since the crucial events in question. In 1947, when Kungys applied for his visa many of the facts at issue in this case were more easily verifiable. This was recognized below by both the trial and appeals courts. 571 F. Supp. at 1131; 793 F.2d at 527. That the government today must surmount a forty year time gap is the direct result of Kungys' concealments and misrepresentations concerning his identity at the visa and naturalization stages. The uncontroverted testimony of both Vice-Consul Seymour Finger and Immigration Judge Julius Goldberg establish that had Kungys told the truth regarding his birthdate and birthplace at either the visa or naturalization stages, discrepancies between this truthful statement and his falsified supporting documents would have triggered an investigation. 793 F.2d at 531, 533. This investigation was foreclosed by Kungys' misrepresentations.

Second, the court should consider as part of the totality of the circumstances the number and nature of Kungys' lies. Kungys lied to United States officials about his birthdate, his birthplace, his wartime residence and his wartime occupations; and he obtained documents to support these lies. Four separate lies operated to mask his identity at two crucial points: the visa application stage and the naturalization proceeding. Both opportunities for government investigation were thwarted by Kungys' concededly willful misrepresentations and concealments. *See* 793 F.2d at 521. The condition precedent to the acquisition of United States citizenship—full and frank disclosure, *Chaunt*, 364 U.S. at 352, was not satisfied by Kungys.

Moreover, the nature and implications of these lies compounds the seriousness of Kungys' misrepresentations. In the very place where Kungys resided during the months of July and August 1941, over 2,000 unarmed men, women and children were exterminated by the Nazi army. Kungys lied about his residence in Kedainiai, Lithuania. This lie deprived the government of its right to inquire into an area bearing directly upon Kungys' moral character and fitness for citizenship. It cannot be said of this circumstance what

was true of the facts in *Chaunt*. Residence in Kedainiai, Lithuania during the summer of 1941 directly bears on the likelihood of Kungys' involvement in the 1941 massacres and this constitutes the "typ[e] of activity which might disqualify one from citizenship . . ." *Chaunt*, 364 U.S. at 354.

Forty years after the fact, the government is now burdened with establishing the materiality of Kungys' misrepresentations and concealments. Forty years ago, without any excuse or explanation, Kungys cut off that line of inquiry. Kungys cannot now claim the protection of a "certainty" test for materiality. *See United States v. Palciauskas*, 734 F.2d 625, 628 (11th Cir. 1984).[5] The proper standard for the case at bar is whether the truth would have triggered an investigation which might have led to the discovery of facts warranting denial of citizenship.

II. KUNGYS' MISREPRESENTATIONS WERE MATERIAL UNDER ANY INTERPRETATION OF *CHAUNT*

Application of the "might have" materiality standard to the case at bar entails a detailed consideration of the facts concerning Kungys' misrepresentations. That two lower courts have reviewed the factual record in this case presents no obstacle to this Court conducting its own *de novo* review. "In reviewing denaturalization

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5. Denaturalization is essentially a suit in equity. *Johanessen*, 225 U.S. at 239. Therefore the Court's construction of materiality should not—as petitioner argues—ignore equity's demand of "clean hands." Here, Kungys has at all relevant times consistently engaged in a pattern of ever-shifting lies under oath to the State Department, the naturalization examiner, I.N.S. investigators, Justice Department attorneys and even the trial court. Kungys has in no believable way explained or excused his repeated violations of oath. Rather, in each case, Kungys engaged in falsification until, when confronted with irrefutable evidence he was lying, Kungys shifted his position yet again. The sole function of petititoner's materiality standard is to insulate him from the proper consequences of his repeated perjuries by a *de facto* statute of limitations. Plainly, Congress has never adopted a denaturalization statute of limitations, nor should this Court judicially create one by adopting petitioner's arguments and, thereby, sanctioning his repeated perjuries directed solely at United States officials, and solely to remove him from the place where over one fourth of Kedainiai's men, women and children were massacred.

cases, we have carefully examined the record ourselves." *Fedorenko*, 449 U.S. at 506. This Court stated in *Chaunt*:

> The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here, for we deal with "judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship."

364 U.S. at 353, *quoting Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

In assessing the materiality of Kungys' misrepresentations, the Third Circuit employed the "probability" test stating "that where the government is able to prove that such investigations probably would have led to the discovery of disqualifying facts, then the materiality test under the second prong of *Chaunt* is satisfied." 793 F.2d at 527. However, the circuit expressly left unresolved the issue of which standard satisfied the materiality test under *Chaunt*. In the case at bar, where the "probability" test was satisfied, *a fortiori*, the "might have" standard is also met.

A. Kungys' Misrepresentations Were Willful

Kungys' misrepresentations and concealments, like his false testimony to the government and to the trial court, are conceded and deliberate, as found by the district court, 571 F. Supp at 1140, and as affirmed by the Third Circuit, 793 F.2d at 521. Though today petitioner disingenuously portrays them as errors and misstatements, *see, e.g.*, petitioner's brief at 35, 40; they were not errors. They were deliberate lies calculated to mislead the State Department in 1941, the naturalization examiner in 1954, I.N.S. investigators in 1975, Department of Justice attorneys in 1981, and the trial court and the court of appeals.

The issue therefore for this Court's review is the materiality of those misrepresentations.

B. Kungys' Misrepresentations Are Material Because The Truth Would Have Triggered An Investigation Possibly Resulting In Disqualifying Facts

1. Kungys' Misrepresentations Concerning His Date And Place Of Birth Are Material As Held By The Court Of Appeals

In this case, unrebutted vice-consul testimony concerning prevailing practice, together with applicable regulations, demonstrate that an investigation would have resulted in this case. At both the visa application stage and the naturalization proceeding, Kungys lied about his birthdate and birthplace. Had Kungys told the truth at either stage, the Third Circuit held, discrepancies between such truthful statements and the falsified supporting documentation submitted by Kungys would have triggered an investigation. This investigation in turn might have resulted in the denial of either his nonpreference quota immigration visa or his naturalization petition. *See* 793 F.2d at 530.

Petitioner seeks to distinguish between the likelihood of an investigation following disclosure of the truth, and the likelihood of an investigation arising from discrepancies in petitioner's application. *See* petitioner's brief at 13-14. Yet, the unrebutted testimony in the trial court concerned the likelihood of investigation arising from discrepancies between truthful statements and falsified documents in petitioner's application. Such discrepancies, without proof of the truth, have been held to show fraud. *See Korematsu v. United States*, 584 F. Supp. 1406 (N.D.Ca. 1984).

Ambassador Seymour Finger, who served as a vice-consul to the American Consulate in Stuttgart, Germany, when Kungys applied for his visa, testified at the trial below. Processing visa applications was among the duties required of vice-consuls. Although Ambassador Finger did not process Kungys' application, he testified as to the uniform standards in use at that time.

In evaluating the uncontroverted testimony of officials such as Ambassador Finger, this Court has noted that the unrebutted testimony of an official who interpreted and administered the immigration law during the applicable period may not be ignored. *See Fedorenko*, 449 U.S. at 511.

Ambassador Finger testified that at the time Kungys applied for his visa in Germany there were only two types of quota immigration visas being issued: preference and nonpreference. Kungys received a nonpreference visa, a type issued as a matter of policy, only to individuals without close relatives in the United States but who were victims of Nazi persecution. 793 F.2d at 530.

Significantly, Ambassador Finger gave unrebutted testimony that if discrepancies existed between supporting documents and the visa applications, the supporting documents would be "called into question" and there "certainly would have been an investigation." 793 F.2d at 531.

That an investigation would have ensued is further supported by the regulations in effect at that time. One such regulation, supporting Ambassador Finger's testimony, states:

> If a consular officer has reason to doubt the authenticity of a document submitted to him, he should take appropriate steps to determine whether such documents may be accepted as genuine and properly issued.

22 C.F.R. § 61.329 (Supp. 1946).

Ambassador Finger's testimony showed that by following standard investigatory methods an investigation would have revealed that Kungys lived in Germany without harrassment and "received a residence permit without special conditions. . ." 793 F.2d at 531. Based upon this testimony the Third Circuit concluded "this information would tend to discredit defendant's claim that he was persecuted by Nazi Germany." *id.*, and therefore was not entitled to the nonpreference visa he received. Thus, truthful statements by Kungys would have led to an investigation which might have revealed the disqualifying fact that the defendant had not been a victim of Nazi persecution and therefore would not have been eligible for a visa.

In applying for his visa, Kungys submitted a certificate from the Lithuania Ex-political Prisoners Central Committee ("Central Committee") which specifically stated that he was "persecuted by the Gestapo." 793 F.2d at 531. Moreover, Finger testified that in considering visa applications the consulate would rely upon expatriate groups such as the Central Committee to screen applicants and to determine eligibility requirements, namely, whether the applicant was a victim of Nazi persecution.

Though Kungys now would challenge this policy requirement, *see* petitioner's brief at 32, it must be remembered that it was petitioner who claimed to be "persecuted by the Gestapo" and who relied on the Central Committee Certificate to support this claim.[6] Indeed, the Central Committee's seal contains the words "Nazi Victims."[7] Kungys is estopped from now contesting a requirement which he made material and used to his benefit in obtaining a visa in 1947. Materiality must be determined on the basis of what Kungys told American officials in 1947—not on what he now says he might have said, but failed to say. Kungys stands logic on its head by arguing that the Court should ignore his claim to have been a Nazi victim. It was precisely this claim that Kungys asserted as the principal basis for his visa application and, until recently abandoned by him, was Kungys' excuse for repeated lying to United States officials.

Furthermore, at the naturalization proceeding petitioner's full disclosure also would have resulted in an investigation possibly leading to the discovery of facts disqualifying citizenship. Judge Goldberg examined Kungys at the naturalization stage and waived the field investigation. Yet, Judge Goldberg's unrebutted testimony indicated that had he been aware that Kungys lied to obtain his visa, misrepresented his date of birth, place of birth, as well as his wartime residence and occupation, and that Kungys swore to these falsehoods in his naturalization petition, he would have been re-

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6. Kungys cites purportedly contrary immigration policies announced by President Truman to undermine the validity of the Nazi-persecutee requirement. Yet, these policies were considered and rejected by the Third Circuit and its reasoning should be affirmed by this Court. The Circuit stated:

> We note that those presidential statements speak only in general terms concerning the need to resettle displaced persons and particularly orphaned children. The papers do not address the eligibility requirements of those seeking quota visas in Germany in 1947, and in no way do they contradict Ambassador Finger's testimony as to procedures in the Stuttgart Consulate.

793 F.2d at 532.

7. Those words were omitted from the seal prepared by petitioner in the Joint Appendix. JTX 29. The complete correct seal is reproduced at X9.

quired to direct a field investigation or simply recommend against naturalization. 793 F.2d at 533.

Yet in 1954 Judge Goldberg was aware of none of these fact. The truth was concealed, the investigation waived, and Kungys naturalized. Had Kungys told the truth at either the visa or the naturalization stage, the unrefuted testimony of Ambassador Finge and Judge Goldberg make it eminently clear that an investigation would have occurred which might have led to the discovery of facts warranting denial of citizenship. Thus, Kungys' misrepresentations were material under the second prong of the *Chaunt* test and as such warrant a setting aside of the denaturalization order.

2. Kungys' Misrepresentations Concerning His Wartime Residence And Occupation Are Material And Provide An Additional Ground For Denaturalization

More than forty-five years after the extermination of over 2,00 unarmed Jewish men, women, and children in a forest in Kedainia, Lithuania, this Court need not determine the extent to which Kungys participated in these killings. It is a question that should have been answered by those American officials specifically appointed to review the eligibility of aliens seeking citizenship at a time when the facts had not yet been blurred by the passage of four decades. *See United States v. Palciauskas*, 734 F. 2d 625, 628 (11th Cir. 1984.

Nevertheless, several crucial facts have been established by the district and circuit courts. It is within the context of the following facts that the evidence against Kungys should be considered.

The district court recognized:

> Of particular interest in the case of Eastern Europeans was the applicant's residences and occupations during the 1939-1945 period, since that information tended to indicate the applicant's relationship to the Nazi occupation force.

571 F. Supp. at 1136.

Juozas Kungys lived in Kedainiai in July and August of 1941. *Id.* at 1133. During those two months nearly 3,000 Jews were killed. *Id.* at 1118. It is uncontroverted that the Germans used local civilians to carry out their mass exterminations in Kedainiai. *Id.* at 1113. Mi-

itary training was the main requirement the Germans had in organizing their auxiliary groups. Kungys not only served in the army prior to the summer of 1941; he attended Cadet School. *Id.* at 1133. Furthermore, he was a member of the local "Riflemen" or "Sauliai." *Id.* Members of the Sauliai aided the Germans in their mass killings in July and August of 1941. *Id.* at 1117.

That Kungys lied about his presence in Kedainiai during the summer of 1941 tends to support the evidence of his complicity in the killings. Three witnesses testified at the trial that Kungys participated in aiding the Germans in the Kedainiai massacres. All three witnesses stated that they remembered Kungys as one of the heads or assistant heads of one of the auxiliary detachments working with the Germans. *Id.* at 1120-1121. The district court ruled that this testimony was unreliable and could only be admitted to establish the occurrence of the killings in Kedainiai. *Id.* at 1132.

The district court reasoned that because the testimony of the Soviet witnesses could not be admitted to prove Kungys' participation in the massacres, Kungys' misrepresentation about his wartime residence "bears primarily upon his credibility generally." *Id.* at 1134.[8] In ruling that Kungys' misrepresentations were not

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8. There is no support for the district court's automatic exclusion of evidence on the basis of its country of origin—in the absence of congressional or executive branch guidance. Even the district court recognized the utter absence of any showing of fraud or coercion in any case brought by our government relying on Soviet source evidence.

> No defense evidence established that any document supplied by the Soviet Union in any denaturalization case was false or that any witness whose testimony was taken in the Soviet Union was subjected to improper pressure or other influences.

571 F. Supp. at 1126.

Soviet source evidence has been admitted into evidence routinely in denaturalization cases as recognized by the court of appeals, 793 F.2d at 520. *See, e.g., United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986) (Soviet-source depositions used); *United States v. Kowalchuk*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, — U.S. — (1986) (Soviet-source depositions used); *United States v. Schuk*, 565 F. Supp. 613, 615 (E.D.Pa. 1983); *United States v. Koziy*, 540 F.Supp. 25 (S.D.Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir. 1984), *cert. denied*, 469 U.S. 835 (1984)

material, the district court relied upon Ambassador Finger's testimony that Kungys' residence in Kedainiai would not, standing alone, have raised any questions in his mind. *Id.* at 1144.

Yet, Ambassador Finger's testimony regarding Kedainiai is more a statement about his memory of a town in Lithuania, than it is a statement about the materiality of Kungys' misrepresentation regarding his wartime residence. Ambassador Finger testified at the trial that he did not specifically remember the name of Kedainiai, 793 F.2d at 532 n. 11, thirty-five years after serving as a vice-consul.

The Third Circuit reasoned that Finger's statement about Kedainiai is of little significance given the content of his entire testimony. The court stated:

> [T]he import of his testimony is that a key factor in eligibility was the applicant's relationship, if any, with the occupying

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(Soviet-source depositions used); *United States v. Linnas*, 527 F. Supp. 426, 433-34 & n. 16 (E.D.N.Y. 1981); *United States v. Osidach*, 513 F. Supp. 51, 58 n. 2 (E.D.Pa. 1981); *United States v. Trucis*, 89 F.R.D. 671 (E.D.Pa. 1981) (refusing to prevent taking of depositions in Latvia). It has also been admitted in other, non-deportation, cases. *See, e.g., Petition of Yuska*, 128 Misc. 2d 98, 488 N.Y.S. 2d 609 (1985).

Moreover, testimony of Soviet witnesses has been used consistently in West German war crime trials. *See, e.g., People v. Kurt Christman*, L.G.E. Munich, F.R.G. (Dec. 19, 1980); *People v. Viktors Arajs*, L.G.E. Hamburg, F.R.G. (Dec. 21, 1979).

In the case at bar, the court of appeals found that the trial court should not have automatically excluded the videotaped testimony. 793 F.2d at 520. The district court's determination declaring "the Soviet authorities are outside the jurisdiction of the United States judicial system" is irrelevant to the admissibility of foreign evidence. The Federal Rules of Civil Procedure provide for the taking of testimonial evidence outside of the United States. Yet, Fed. R. Civ. P. 28(b) notwithstanding, the district court determined its standard of examination to be one of "particular care." *See* 571 F. Supp. at 1124.

In essence, admissibility seems merely to be a function of the extent to which the evidence exculpates Kungys. Soviet testimonial evidence was admitted when it impeached the credibility of the inculpatory Soviet witnesses; 571 F. Supp. at 1124, while other Soviet testimonial evidence concerning Kungys' complicity in the Kedainiai killings was not admitted.

> Nazi forces. As he testified, one way to determine the nature of such a relationship was to look at the occupant's residences during the period of occupation. It is undisputed that Kedainiai, in July and August of 1941, was the site of Nazi murders and that the defendant resided there during that period.

Id. This is the more sensible view of Ambassador Finger's testimony concerning the materiality of Kungy's misrepresentations about his wartime residence. Furthermore, Ambassador Finger stated that Kungys' wartime employment in a management capacity in a 15-employee brush and broom factory in Kaunas might have prompted him to probe further at the personal interview. 571 F. Supp. at 1144. Taken together with Kungys' other lies, residence in Kedainiai would have aroused suspicion about his relationship with the occupying Nazi forces. As the prevailing regulations then required, suspicion would have turned into investigation, 22 C.F.R. § 61.329 (Supp. 1946)—an investigation which might have led to facts justifying denial of citizenship.

Finally, Kungys seeks to credit Ambassador Finger's testimony concerning his residence in Kedainiai, 571 F. Supp. at 1137, yet at the same time discredit the Ambassador's testimony concerning the requirements for obtaining a nonpreference visa, i.e., only victims of Nazi persecution. 571 F. Supp. at 1137 n. 7. *See* petitioner's brief at 4, 5, 17, 31, 32. It is transparently clear that Kungys' view of Finger's credibility is merely a function of the degree to which Ambassador Finger's testimony inculpates him.

C. The Government Has Met Its Burden To Show Kungys' Willful Misrepresentations And Concealments Were Material

This case centers around four major lies: date of birth, place of birth, wartime residence and wartime occupation. The government has proven by clear and convincing evidence that Kungys willfully misrepresented the facts and deliberately concealed the truth concerning these four basic elements of his identity. 571 F. Supp. at 1137. Moreover, the government has shown that Kungys resided in Kedainiai during July and August of 1941, was a member of the

Sauliai, and worked as a bookkeeper-clerk in the Kaunas brush and broom factory during the 1941-44 period.

The uncontroverted testimony of Vice-Consul Finger and Immigration Judge Goldberg establishes that had Kungys told the truth at either the visa or naturalization stage, an investigation would have occurred. Beyond the discovery of the disqualifying fact that Kungys was not entitled to the visa he obtained, 793 F.2d at 531, what such an investigation would have revealed is difficult to state with absolute certainty. However, certainty is not the standard in this case. It is enough that the truth would have led to an investigation possibly resulting in facts warranting the denial of Kungys' citizenship.

Forty years after Kungys lied to obtain a visa, the government has uncovered his fundamental misrepresentations concerning his identity and wartime residence. Had Kungys not blocked the government's course of inquiry at the time when the facts were fresh and the evidence accessible, *a fortiori*, more could have been discovered about Jouzas Kungys and the lies he told. *United States v. Palciauskas*, 734 F.2d at 628. By depriving the government of its right to conduct an investigation which might have led to facts justifying denial of citizenship, Kungys' misrepresentations and concealments were material. Therefore, pursuant to 8 U.S.C. § 1451(a), Kungys should be denaturalized.

CONCLUSION

For all the reasons set forth herein the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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